FILE COPY

FILED
OCT 22 1946
CHARLES ELMORE CROPLEY
CLERK

No. 61

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	3
Summary of argument	19
Argument:	
I. The Interstate Commerce Commission's modification of the original certificate issued to Seatrain was in conformity with the terms of that certificate, and was required by the evidence and by the terms of the Interstate Commerce Act	24
A. Seatrain's operations were correctly reflected by the amended certificate and incorrectly reflected by the original certificate	26
(1) The New York-New Orleans traffic	27
(2) The New York-Texas City traffic	39
B. The Commission had power to modify the original certificate in view of its terms	42
C. No question of revocation is involved	52
D. The result is not different if Seatrain's rights be deemed a franchise	56
II. In any event, it was error for the district court to set aside the Commission's order in reliance on evidence which Seatrain had repeatedly declined to present to the Commission	57
Conclusion	66
Appendix: Pertinent provisions of the Interstate Commerce Act	67

CITATIONS

Cases:	
Acker v. *United States*, 298 U. S. 426	60
Aetna Ins. Co. v. *Hyde*, 275 U. S. 440	59
Alton R. Co. v. *United States*, 315 U. S. 15	33, 48
Baldwin v. *Milling Co.*, 307 U. S. 478	50
Baltimore Insular Line Inc., Contract Carrier Application (I. C. C., Apr. 23, 1945)	54
Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349	51, 62, 63
Beaumont, S. L. & W. Ry. v. *United States*, 282 U. S. 74	59
Boudreaux Contract Carrier Application, 260 I. C. C. 67	55
Broad River Co. v. *South Carolina*, 281 U. S. 537	57

Cases—Continued Page

Colmar S. S. Corp. Common Carrier Application, (I. C. C., Nov. 27, 1945) 54
Chicago, St. P., M. & O. Ry. Co. v. United States, 322 U. S. 1 46
Connors Marine Inc. Contract Carrier Application, 250 I. C. C. 717 55
Crescent Express Lines, Inc. v. United States, 320 U. S. 401 ..... 27, 33, 37, 47
Foss Launch & Tug Co. Applications, 260 I. C. C. 103 ..... 8, 43, 54
Frost v. Corporation Commission, 278 U. S. 515 57
Gemsco, Inc. v. Walling, 324 U. S. 244 45
Georgia Comm. v. United States, 283 U. S. 765 39
Hay Co. Contract Carrier Application, (I. C. C., May 19, 1945) 54
Hoboken Mfrs. R. Co. v. Abilene & S. Ry. Co., 237 I. C. C. 97, 248 I. C. C. 109 4
Hoboken Mfrs. R. Co. v. Akron, C. & Y. Ry. Co., 234 I. C. C. 114 4
Hutton Contract Carrier Application, (I. C. C., Mar. 7, 1944) 55
Interstate Commerce Commission v. Hoboken Mfrs'. R. R. Co., 320 U. S. 368 ..... 4, 34
Investigation of Seatrain Lines, Inc., 195 I. C. C. 215 ..... 4, 29
Investigation of Seatrain Lines, Inc., 206 I. C. C. 328 ..... 4, 31
Island Transportation Co. Common Carrier Application (I. C. C., Nov. 29, 1945) 54
Knappton Towboat Co. Applications, (I. C. C., July 31, 1945) 54
Louisville Bridge Co. v. United States, 242 U. S. 409 57
Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298 59
McWilliams Blue Line, Inc., Common Carrier Application, 260 I. C. C. 673 53
Manufacturers Ry. Co. v. United States, 246 U. S. 457 63
Marine Transport Lines, Inc., Contract Carrier Application, 260 I. C. C. 620 53
Mirene Co. The, Applications, (I. C. C., Apr. 4, 1946) 54
Missouri Pacific Case, 245 I. C. C. 143 ..... 40, 41
Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 64
National Broadcasting Co. v. United States, 319 U. S. 190 60
Nicholson Universal Steamship Co. Applications, 260 I. C. C. 393 53
Noble v. United States, 319 U. S. 88 ..... 37, 47, 48
Parker Contract Carrier Application, (I. C. C., April 1, 1944) 54
Pearsall v. Great Northern Ry. Co., 161 U. S. 646 57
Potomac River Line Common Carrier Application (I. C. C., Aug. 16, 1943) 54
Richmond Navigation Co. Common Carrier Application, (I. C. C., Aug. 18, 1945) 54

Cases—Continued Page

Schafer Bros. S. S. Lines Application, 250 I. C. C. 353 53
Seatrain Lines, Inc. v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7 4, 32
Seatrain Lines, Inc. v. *Akron, C. & Y. Ry. Co.*, 243 I. C. C. 199 4, 33
Seatrain Lines, Inc. v. *Akron, C. & Y. Ry. Co.*, 250 I. C. C. 297 4
Seatrain Lines, Inc., Common Carrier Application, 260 I. C. C. 420 15, 19
Shamrock Towing Co. Inc. Contract Carrier Application, (I. C. C. Aug. 25, 1945) 54
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177 60
Sudder & Christenson Common Carrier Application, 260 I. C. C. 643 54
Tagg Bros. v. *United States*, 280 U. S. 420 60, 61
Terrebonne Towing Co. Inc. Applications, 260 I. C. C. 551 53
Union Barge Line Corp. Applications, 260 I. C. C. 563 53
United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 27, 33, 37
United States v. *Hancock Truck Lines*, 324 U. S. 774 65
United States v. *Idaho*, 298 U. S. 105 62
United States v. *Louisville & N. R. R. Co.*, 235 U. S. 314 60
United States v. *Maher*, 307 U. S. 148 27
United States v. *Morgan*, 307 U. S. 183 65
United States v. *Pennsylvania R. R. Co.*, 323 U. S. 612 4, 34
Water Co. v. *Knoxville*, 200 U. S. 22 57
Yonkers v. *United States*, 320 U. S. 685 62

Statutes:

Interstate Commerce Act, 49 U. S. C. 901–923:

National Transportation Policy 67
Section 17 (3) 68
Section 17 (7) 21, 35, 50, 52, 56, 69
Section 17 (9) 69
Section 206 (a) 27
Section 208(a) 38
Section 212 3, 70
Section 212 (b) 71
Section 306(a) 45
Section 306(e) 45
Section 309 (a) 3, 26, 27, 71
Section 309 (c) 3, 26, 72
Section 309 (d) 16, 18, 20, 21, 38, 43, 45, 46, 56, 73
Section 309 (e) 22, 25, 56, 74
Section 312 45
Section 313(a) 45
Section 313(b) 45
Section 313(c) 45
Section 315 (c) 16, 18, 21, 48, 56, 74

Statutes—Continued
Interstate Commerce Act, 49 U. S. C. 901–923—Con. Page
Section 315 (d) 16, 21, 48, 56, 74
Section 315 (e) 21, 49, 74
Section 316 (a) 21, 51, 74
Transportation Act of 1940, c. 722, 54 Stat. 898, 899, 929–952 ..... 36, 67
Miscellaneous:
Webster's New International Dictionary (2d unabridged ed. 1939) 51

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 61

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SEATRAIN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

OPINIONS BELOW

The opinion of the District Court (R. 119) is reported at 64 F. Supp. 156. The report of the Interstate Commerce Commission here involved (R. 23), dated February 6, 1945, is reported at 260 I. C. C. 430. The original report of Division 4 of the Commission (R. 53), dated July 2, 1942, which was modified by the full Commission, is not reported.

JURISDICTION

The final decree of the District Court was entered on February 7, 1946 (R. 132). The petition

for appeal was filed February 27, 1946 (R. 133), and was allowed on the same day (R. 134). Probable jurisdiction was noted on April 22, 1946 (R. 433). The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 67–74.

QUESTIONS PRESENTED

1. Whether, after issuing a certificate to a water carrier authorizing it to perform specified service, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," the Interstate Commerce Commission may, after hearing, modify the certificate so as to confine the carrier to the substantial operations which it had conducted in the past, or which, as to operations not protected by the "grandfather" clause, the Commission found were required by public convenience and necessity.

2. Whether an order of the Interstate Commerce Commission modifying a certificate theretofore issued to a water carrier may be set aside

by a district court on the basis of evidence showing the carrier's alleged commitments made on the strength of the original certificate, where the carrier repeatedly declined to introduce that or any other evidence before the Commission at the modification hearings.

STATEMENT

Acting under the provisions of Part III of the Interstate Commerce Act, 49 U. S. C. 901–923, as added by the Transportation Act of 1940, c. 722, 54 Stat. 898, 929–952, appellee Seatrain Lines, Inc., filed two applications on May 29, 1941, in the first of which it sought a certificate under the "grandfather" clause of Part III, Section 309 (a), authorizing *continuance* of operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally and passengers between New York and New Orleans, La., via the Atlantic Coast and the Gulf of Mexico (R. 214), and in the second of which it sought a certificate under Sections 309 (a) and (c) authorizing *continuance* of an operation (termed an *interim* operation) instituted between January 1, 1940 (the critical date under the "grandfather" clause) [1] and February 1, 1941, as a common carrier by water, in inter-

[1] Seatrain's "grandfather" application sought authority to transport "all commodities *permitted by law*" (R. 215). The italicized words were added by Seatrain to the Commission's form used in these proceedings (R. 205).

state or foreign commerce in the transportation of commodities generally between New York and Texas City, Texas, by way of the Atlantic Ocean and the Gulf of Mexico (R. 236). The two applications were consolidated, and were disposed of in one report (R. 23, 53).

In its application under the "grandfather" clause, Seatrain described its operation as a "regular weekly service (inaugurated in 1932) in each direction between the Port of New York and the Port of New Orleans, via Havana, Cuba, or direct" (R. 218); it also advised that Seatrain has continued "to operate as above stated" (R. 218). Attached to the application was an affidavit of its vice-president, E. K. Morse, dated May 28, 1941, in which he asked the Commission to refer to its findings in prior cases involving Seatrain (R. 230–231).[2]

Seatrain's application as an "interim" operator between New York and Texas City, Texas, contained substantially the same information, except that its financial condition, necessary to be

---

[2] See *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 206 I. C. C. 328; *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 243 I. C. C. 199, 259 I. C. C. 297; *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.*, 234 I. C. C. 114; *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 237 I. C. C. 97, 248 I. C. C. 109.

For cases in which Seatrain's operations have been before this Court, see *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. R. Co.*, 320 U. S. 368, and *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612.

shown for an operator conducting a new service, was more fully developed (R. 257–264).

An examiner of the Commission conducted a field examination concerning Seatrain's operations and recommended that its application be granted (R. 323). In his return to the questionnaire submitted to the Commission, the following information was set out (R. 273):

> Q. 8. Does the nature of the commodities transported require special facilities or equipment?
>
> A. Yes. If answer is "Yes," describe. The vessels are especially designed to carry approximately one hundred (100) loaded freight-train cars. The cars are transferred to the vessels by means of especially constructed bridge cranes. The vessels are also equipped with tank compartments for the shipment of fuel oil.

In an affidavit of Mr. Hodgson, vice-president of Seatrain, reference to testimony in prior Commission proceedings was made, and it was stated (R. 288):

> As a matter of fact the Commission has itself in numerous proceedings on extensive records so fully investigated the public interest in Seatrain's operations and in the type of transportation service which it affords, and has so definitely found that Seatrain provides a type of transportation which is required by the public interest that

its own decisions would seem to afford a controlling precedent here. From the standpoint of the character of the service which Seatrain's facilities and type of vessels make possible and the transportation economies resulting from its method of operation, its service between Texas City and Hoboken is in practically all respects similar to its service between New Orleans and Hoboken and the findings of the Commission as to the public interest in connection with the latter are equally applicable in connection with the former.

Without further proceedings, Division 4 of the Commission, consisting of three members, issued its report (R. 53) wherein the Division found:

> We find that Seatrain Lines, Inc., was in bona fide operation on January 1, 1940, as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and New Orleans, by way of the Atlantic Ocean and the Gulf of Mexico; and that such operation has been continued since that date, except for an interruption of service over which applicant had no control.
>
> We further find that the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City, by way

of the same route; and that applicant is fit, willing, and able to continue the operation.

We further find that applicant is entitled to a certificate authorizing such operations, subject, however, to general conditions which are necessary to carry out, with respect to continuance of applicant's operations, the requirements of part III of the act and the orders, rules, and regulations of the Commission thereunder. For the reasons given above, that portion of the application seeking authority to transport passengers between New York and New Orleans will be denied. (R. 56.)

A certificate authorizing the above operations was issued by Division 4 on July 2, 1942, to become effective August 10, 1942 (R. 52). That certificate read in part as follows (R. 52):

It is hereby certified, That public convenience and necessity require the continuance of operations by Seatrain Lines, Inc., as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the

exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

This is the certificate which the court below held was beyond the power of the Commission to modify.

Thereafter, on December 18, 1943, Division 4 in *Foss Launch & Tug Co. Applications,* 260 I. C. C. 103, found that "Freight-car ferry service is a special kind of transportation not embraced within the term 'transportation of commodities generally' by water", and accordingly reopened the Seatrain case for reconsideration on the same day, to consider whether the certificate issued properly described seatrain's operations on and since January 1, 1940 (R. 24).[3] On January 27, 1944, the Commission ordered (R. 68):

> That the said proceeding be, and it is hereby reopened for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942,

[3] That certificate was too narrow since it did not permit Seatrain to engage in its own characteristic operations, and too broad in that it permitted Seatrain to become a common carrier of commodities not already loaded into cars.

should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned.

A motion to vacate and rescind the reopening order was filed by Seatrain on March 24, 1944 (R. 69), and renewed at the hearing of March 27, 1944. (R. 331.) At that hearing, Mr. McCollester, counsel for Seatrain, stated (R. 330):

> I am directed by my client to inform the Commission that until our motion is passed upon, and if the Commission wishes argument on it we are, of course, prepared to argue it more fully; but until our motion is acted upon, we are not prepared to go forward with any evidence.
>
> Commr. PORTER: Well, I will overrule the motion. Of course, you know without my advising you at all, you have of course a perfect right of appeal to the entire Commission, but at the same time I will overrule the motion.

A Commissioner was designated to hear the case (R. 329), because of its importance. No evidence was introduced at the March 27, 1944,

hearing for the reasons stated by Mr. McCollester, but his motion to vacate the order of reopening was presented to the entire Commission and denied on April 3, 1944, "without prejudice to its renewal at the conclusion of the hearing to be held pursuant to said order of reopening" (R. 78). Thereafter, following the filing of petitions for intervention by the Ocean Steamship Company of Savannah, Agwilines, Inc., Eastern Steamship Lines and the Bull Steamship Line (R. 347–351), which were granted (R. 347–350), the matter came on for further hearing before Commissioner Porter on April 24, 1944 (R. 337).

At this rehearing, Mr. McCollester said (R. 339):

> Mr. McCollester. Mr. Commissioner, we have no evidence to offer. Our application was filed, the supporting data was presented in support of the two applications.
>
> The certificates have been issued and have been in effect for a year and a half or more, and therefore, we do not conceive that there is any question of fact that can now be before the Commission in regard to them, and, consequently, we have no evidence.

After appellee thus declined to produce evidence, Commissioner Porter referred in detail to the record the Commission would have before it in its consideration of the case (R. 340–343), including the prior decisions of the Commission relating to

Seatrain (R. 341); the two applications filed May 28, 1941, with accompanying affidavits and exhibits (R. 342); the report of Examiner Martin and the questionnaire and affidavit attached thereto (R. 342); and certain letters concerning the development of the Seatrain service and its use by shippers (R. 342–343). After the Commissioner had detailed the record as above, Mr. McCollester said (R. 343):

> Mr. McCollester. I thank Your Honor for bringing those matters to our attention. If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942, which contains certificate and was the material upon which that certificate was based.
>
> If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the receipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.
>
> Commr. Porter. Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all mat-

ters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester. That is right.

The entire Commission on May 8, 1944, by order, affirmed its earlier action overruling Seatrain's application to dismiss the proceedings for lack of jurisdiction (R. 351) and the matter was fully argued before the entire Commission on July 21, 1944 (R. 371). At that argument Mr. McCollester stated his position as follows (R. 377):

> Commr. Porter. Well, your point briefly is that this Commission when it once issues a certificate that that ends it and that it loses its power to change, alter, or modify it in any respect whatsoever? Isn't that your motion?
>
> Mr. McCollester. Yes, Mr. Commissioner; if there is no fraud or misrepresentation and if there is full disclosure of the facts and if action has been taken by the applicant in reliance upon the rights granted.

After referring to prior Commission decisions, counsel for appellee stated (R. 378):

> Now we naturally in those proceedings stressed the non-break-bulk feature of Seatrain service, the movement of freight in railroad cars, and your Honors will find that in the first of those proceedings, the Seatrain investigation by the Commission

on its own motion in which the development of Seatrain was described, and it was made very clear by the testimony of Mr. Brush that the first motive in the development of the Seatrain ships and other handling facilities was one of operating efficiency in the operation of a water carrier to eliminate stevedoring expense of handling the cargo at the ports and the delay to vessels incident to the ordinary break-bulk operation. That that was the motive which led to the research which in turn produced the Seatrain ships and the handling facilities. That likewise they provided benefits to shippers in the handling of their freight at the port, but your Honors will recall that in the several rate cases before you you have found that those benefits from the standpoint of shippers were not such as to justify higher rates than the rates contemporaneously in effect via the break-bulk lines, and the evidence very definitely showed that Seatrain Lines was in competition with the break-bulk lines for the handling of the same type of freight.

Later the following colloquy ensued between counsel and the Commissioners (R. 380–381):

> I would say this, that the certificates which have been issued, if there was no fraud or misrepresentation or failure of full disclosure in the applications for the certificates, if they have become effective, you cannot now revoke any of the rights,

and they are entitled to all of the rights which would accrue under the language of the certificate.

Commr. PORTER. Forever and a day.

Mr. MCCOLLESTER. Forever and a day, so long as they do not abandon. If they abandon, that is another matter. It seems to be pretty well established by the decision of the courts that in the event of abandonment a certificate may be cancelled.

* * * * *

Chairman PATTERSON. As a matter of fact, do you or do you not during the critical period handle this freight in railroad cars always, or is it sometimes handled otherwise?

Mr. MCCOLLESTER. I understand it was sometimes handled otherwise, Mr. Commissioner. I would not misrepresent the facts to the Commission, *although we have avoided intentionally representing the case here on a factual basis because we do want to raise only the question of law as to your power and therefore we have not presented proof, which we had an opportunity to do, I would say,*[4] but we actually carry, and how we actually carry it. I would not want to mislead you and suggest that we carry any substantial portion of our business other than in railroad cars, but there was some, and you can call it "consider-

[4] Compare this admission with the statement made to the district court that Seatrain had not been "invited" to present testimony to the Commission (R. 194).

able", depending upon what the word "considerable" means, and looking toward the future, the limitation of having to have to handle freight in railroad cars is a very serious limitation. [Italics added.] (R. 391.)

The Commission decided the case on February 6, 1945, rendering a full report (R. 23); *Seatrain Lines, Inc., Common Carrier Applications,* 260 I. C. C. 430. It held that, since Seatrain had never carried commodities generally, it was entitled to continue operations as a common carrier only in the transportation of liquid cargoes in bulk, of empty railroad cars, and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer between New York and New Orleans and Texas City. The Commission directed the issuance of a corrected certificate and order to give effect to the report. The Commission made findings of fact and conclusions of law. 260 I. C. C. at 443–445; R. 38–39. Three Commissioners dissented, two on the ground that the Commission had no power as a matter of law to vary the former certificate, and one for the reason that this power, which he felt existed, should not here be exercised. One Commissioner took no part.

The gist of the Commission's report was that Seatrain's traffic, with the exception of a small amount of liquid cargo carried in the vessel's

tanks, was handled in freight cars from origin to destination, in non-break bulk service; that the New York-Texas City service was in all respects similar to the New York-New Orleans service; and that, through inadvertence, the original certificate did not correctly describe the operations in which, according to the record, applicant was engaged on and since the "grandfather" date. Accordingly, the question was whether, in the absence of fraud or misrepresentation, the Commission had power to correct a certificate thus inadvertently issued. The Commission held that, under Sections 315 (c) and (d), it had complete control over its orders, and ought at any time recall or amend them whenever error appeared; that the certificate was in terms subject to "such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," under Section 309 (d); and that the proviso in Section 309 (d), prohibiting the imposition of terms, &c., which restrict the right of the carrier to add to its equipment and facilities, would be meaningless if the Commission lacked power to modify a certificate except for fraud or misrepresentation. The Commission stated that its power to correct a certificate would be sparingly exercised, and so as to avoid, if practicable, any adverse effect on vested rights, but noted that the record contained no showing as to any commitments by Seatrain

on the strength of the certificate. (R. 37.) Indeed, as the Commission pointed out, Seatrain had not operated under the certificate since all its vessels had been requisitioned by the Maritime Commission. (R. 27.)

The petition to set aside the Commission's report and order of February 6, 1945, was filed in the court below on May 12, 1945 (R. 2–81). Broadly speaking, the petition alleged that the Commission had no authority to change a certificate once it had been issued; that the authority conferred by Section 315 (c) to impose terms and conditions after the issuance of the certificate relates merely to "service" conditions, and did not authorize the Commission to change a certificate in the manner it sought to do here, and that to hold otherwise would deprive plaintiff of its property without due process of law in violation of the Fifth Amendment (R. 21).

It was urged in the district court that the carrier could not accept and deliver certain traffic under the amended certificate that it had been accepting and delivering for many years prior to the enactment of the Transportation Act of 1940 (R. 149). Allegations concerning lack of evidence to support the Commission's conclusion were also made (R. 20).

Appellee conceded before the district court that the great bulk of Seatrain's business was in cars (R. 153, 189–190), though claiming that its status

was that of a common carrier generally handling "thousands of commodities" (R. 172). Pressed by the court, counsel then admitted that, aside from shipments in cars, they had handled many commodities, but quickly conceded that the record did not show what they consisted of, except he could recall "crude rubber" (R. 172).[5]

The district court found, contrary to the finding of the Commission, that Seatrain, in addition to its freight-car business, "transported commodities generally" (R. 120). It held, based on testimony introduced over appellants' objections (R. 143), that Seatrain "has made substantial expenditures and important commitments for the future" on the strength of the original certificate (R. 121). In support of this finding it relied on the testimony of the witness Brush (R. 125), which testimony was neither presented nor sought to be presented to the Commission.

The court found that Seatrain had an opportunity to present evidence to the Commission, of which it did not avail itself (R. 121). The court held that the authority conferred on the Commission by Section 309 (d) to impose terms and conditions "at the time of issuance [of the certificate] and from time to time thereafter", did not authorize the Commission to take the action it did (R. 122), and that Section 315 (c) of the

[5] We have been unable to find support for even this one commodity, speaking now of traffic moving in other than railroad cars.

Act, authorizing the Commission to modify, suspend, etc., its orders in such manner as it shall deem proper, did not apply to the cancellation of a certificate, but only to "regulatory orders" (R. 123). It refused to hold that the certificate had the effect of a "franchise", deeming this question relatively unimportant (R. 124). And, in the face of the Commission's finding (260 I. C. C. at 444, Fdg. 8; R. 39) that the original certificate was issued "by inadvertence", the court below held that this certificate was not issued by inadvertence but represented the Commission's considered judgment (R. 124–125).

Accordingly, the court concluded that the Commission had no authority to correct its earlier certificate and that its order of February 6, 1945, resulted in an uncompensated confiscation of Seatrain's property (R. 125). By decree dated February 7, 1946, the court set aside the Commission's order (R. 132).

SUMMARY OF ARGUMENT

I

Seatrain's operations were correctly reflected by the amended certificate and incorrectly reflected by the original certificate.

As to the New York-New Orleans traffic, protected by the "grandfather" clause, Seatrain was entitled to a certificate granting it substantial parity with what it was doing when the Act was

passed. Prior reports of the Commission made it abundantly clear that Seatrain's vessels carried only cargo in railroad cars (other than a small amount of liquids in the vessels' tanks) and carried such cargoes only between ports at which special loading facilities had been provided; and, moreover, that it never carried "commodities generally." Consequently the original certificate went beyond the terms of the Act, which permitted only a "continuance" of existing operations. Seatrain can do everything under the amended certificate that it ever did in the past. To sustain the original certificate in perpetuity would unsettle what the "grandfather" clause was designed to stabilize.

As to the New York-Texas City route, the record shows a precisely similar kind of operations. These operations, likewise, were correctly reflected by the amended certificate and incorrectly reflected by the original certificate. The original and the amended certificates covered both routes, and that circumstance has never been seriously objected to.

When the Commission modified the original certificate, it did so in strict compliance with the modification proviso therein contained. The inclusion in the certificate of a continuing power on the part of the Commission to limit or condition the authority therein granted was based on Section 309 (d) of the Act. If the Commission

were without power of modification except in cases of fraud or misrepresentation, then the proviso to Section 309 (d), prohibiting modification through the imposition of particular kinds of restrictions, would be meaningless. Nor can the scope of Section 309 (d) be limited by suggesting that it was intended to cover only modifications in respect to matters which are the subject of other sections of the Act. Analogous cases under Part II of the Act support the construction of Section 309 (d) adopted by the Commission.

Moreover, even if the original certificate had been unconditional in its terms, without the inclusion of a reserved power to alter or amend, the Commission would have had power to modify it by virtue of Sections 315 (c), (d), and (e), and of Section 17 (7); the latter provision is made applicable here by Section 316 (a). In view of those provisions, it seems unnecessary to inquire whether the action of Division 4 in issuing the original certificate was occasioned "by inadvertence," as found by the Commission, or whether it resulted from "the considered judgment of Division 4," as held by the court below, even though there seems no justification for the court's disregard of a specific finding as to the Commission's mental processes. In any event, by the plain language of Section 17 (7), the

original certificate was subject to reconsideration and modification.

No question of revocation is involved; the Commission is neither terminating Seatrain's rights nor barring it from the sea. Modifications of certificates which extend rights previously granted have frequently been made by the Commission, and never questioned. While the modification here involved was restrictive, and to that extent a revocation *pro tanto,* Congress cannot have intended to permit only such modifications as grant greater rights, to the exclusion of restrictive ones. And the modification here involved was in no fair sense a revocation, since the amended certificate authorizes Seatrain to operate precisely as it has always operated in the past.

It is not necessary to determine whether the original certificate was a franchise, although in view of Section 309 (e) the argument that it was hardly seems tenable. But even assuming *arguendo* that a franchise was granted, it was by its terms a variable franchise which the grantor has duly varied. Moreover, being issued under an Act which conferred on the Commission power to modify its orders and certificates, the "franchise" is clearly subject to modification in accordance with the statutory provisions. Calling the original certificate a "franchise" does not alter the result.

II

The district court found, on testimony first offered at the hearing there, that Seatrain had made large expenditures in reliance on the original certificate, that it will incur large losses if the order issuing the amended certificate goes into effect, and that this would amount to an unconstitutional confiscation. Seatrain several times advisedly declined to present this or any other evidence before the Commission, although this proof might well have affected the result, since the Commission indicated it would not ordinarily alter certificates if vested rights had accrued in reliance thereon.

The situation here is one where, on the precise issue of the Commission's naked legal power to modify a certificate, the court on one record decides that the Commission erred in a result which it reached on another record. This was plain error; when administrative orders are sought to be set aside in the courts, evidence which was not before the administrative agency may not be received. Here the issue before the court was identical with the issue before the Commission. Seatrain has sought judicial review without first exhausting its administrative remedies. It cannot, by recasting its assertion of the Commission's lack of power to modify a certificate in generalized terms of unconstitutional confiscation, proceed to support that assertion in the courts with testimony

which it refused to present to the Commission. To permit it to do this, as the court below did, turns judicial review into a species of legal shell game in which the same question receives different answers before different tribunals as testimony which is withheld at one juncture is suddenly produced at another.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION'S MODIFICATION OF THE ORIGINAL CERTIFICATE ISSUED TO SEATRAIN WAS IN CONFORMITY WITH THE TERMS OF THAT CERTIFICATE, AND WAS REQUIRED BY THE EVIDENCE AND BY THE TERMS OF THE INTERSTATE COMMERCE ACT

The only substantive question presented for decision is whether, where the Interstate Commerce Commission has issued a certificate to a water carrier authorizing it to perform specified service, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission," and where such a certificate grants the carrier rights to which it is clearly not entitled under Part III of the Interstate Commerce Act, the Commission may, after hearing, modify the certificate to confine the carrier, in respect of operations protected by the "grandfather" clause, to those operations which it had conducted in the past, and, as to operations

not so protected, to such as the Commission found were required by public convenience and necessity.

The present case does not present any question of the Commission's powers to modify a certificate unconditional in its terms, so as to bring it into conformity with the facts and the law, although, as we shall point out below, the Act is amply broad enough to empower the Commission to act in such a situation also. Nor does the present case raise the question whether the certificate first issued the carrier amounts to a perpetual franchise, as Seatrain contends; for even if, contrary to the express terms of Section 309 (e),[6] it be so considered, it was by its terms a variable franchise, which the Commission duly varied. Finally, though we doubt the district court's right to hold that the original certificate represented the Commission's considered judgment, in the light of the Commission's specific finding that it was issued "by inadvertence", we deem it unnecessary to resolve that question, for in either event, as we shall show, Seatrain is precluded by the plain terms of the Act from asserting a vested and irrevocable right to profit from the Commission's error.

It seems appropriate also to state at this juncture, in view of the distinction between the New

[6] "No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways." Section 309 (e), 49 U. S. C. 909 (e).

Orleans and Texas City Routes,[7] that in both instances the Commission's power to amend the certificate to conform to what the Act commanded it to grant is the same. The circumstance that, in one instance, the certificate is to be based on a determination of historical fact, and, in the other, is to be based on a determination of public convenience and necessity made in the exercise of an expert judgment as to the nation's transportation needs, is quite immaterial on the issue of the Commission's power to amend the certificate, in accordance with its terms, so that it may correctly reflect the facts which the Commission was required to determine.

A. SEATRAIN'S OPERATIONS WERE CORRECTLY REFLECTED BY THE AMENDED CERTIFICATE AND INCORRECTLY REFLECTED BY THE ORIGINAL CERTIFICATE

We turn first to a consideration of the evidence before the Commission and of the policy of the Act, for, as we shall show, the provisions of the Interstate Commerce Act, in the light of

[7] Since 1932, appellee has been engaged in New York Harbor-New Orleans operations with the Seatrain type of vessel (R. 229). The application for continuance of this service is under the "grandfather" clause, Section 309 (a), Part III, of the Interstate Commerce Act.

The new operation between New York Harbor and Texas City, instituted after the critical "grandfather" date of January 1, 1940, is governed by the public convenience and necessity section of Part III of the Interstate Commerce Act, section 309 (c), and the tests to be applied are different from the "grandfather" tests.

the facts appearing in the record presented to the Commission, required the precise amendment of the certificate which the Commission made.

(*i*) *The New York-New Orleans Traffic*

As we have already pointed out, Seatrain's rights in its New York-New Orleans traffic are within the "grandfather" clause of Part III of the Act, Section 309 (a). This section is in all respects similar to the cognate provision of Part II, Section 206 (a), which has frequently been before this Court. The purpose of such a provision was to establish "substantial parity between future operations and prior *bona fide* operations." *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481. Insofar as the necessary determination "whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission." *United States* v. *Maher*, 307 U. S. 148, 153–154. The applicable standards have but recently been discussed here. *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409–410:

> The statute, we have said, contemplated "substantial parity" between future and prior operations. *Alton R. Co.* v. *United States*, 315 U. S. 15, 22. "As the Act is remedial and to be construed liberally, the

proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms." *McDonald* v. *Thompson,* 305 U. S. 263, 266; *Gregg Cartage Co.* v. *United States,* 316 U. S. 74, 83. Consequently we held in *United States* v. *Maher,* 307 U. S. 148, that operations over irregular routes did not provide the requisite continuity to support an application for regular service between fixed termini, even when the highway between the fixed termini had been occasionally used for part of the distance in the irregular route operations.

When the Commission requires the applicant under the grandfather clause to limit its future operations to the type of equipment and service previously offered, it acts within its power and in accord with the purpose of Congress to maintain motor transportation facilities appropriate to the needs of the public. S. Rep. No. 482, 74th Cong., 1st Sess. If there is a need for a different type of service for this transportation, applications may be filed under § 307.

Under the "grandfather" clause, therefore, Seatrain was entitled to a certificate granting it substantial parity with what it was doing when the Act was passed. To that we turn; and we examine at the outset the many reports concerning Seatrain which the Commission already had

before it, and which Seatrain asked the Commission to consider (R. 341).

We set forth here, as a matter of convenience to the Court, pertinent excerpts from the Commission's reported decisions which discuss the details of Seatrain's operations.

Investigation of Seatrain Lines, Inc., 195 I. C. C. 215 (decided July 11, 1933):

> Seatrain owns three vessels designed to transport by water freight brought to or moved from ports by railroads without transferring the freight from the cars, thereby avoiding delays and expenses incident to ordinary steamship operation. * * * [p. 218].
>
> While the original vessel has tank space for 2,200 tons of liquid cargo, and the new vessels have tank space for 4,000 tons of liquid cargo, each vessel is designed primarily for transportation of cargo only when loaded in railroad cars. * * * These vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided. Such facilities have been provided at only three ports, namely, Hoboken, New Orleans, and Havana [p. 219].

At pp. 219–220 of the same report, the Commission went on to describe Seatrain's vessels and method of loading and unloading.

The Commission further said (pp. 221–222, 228–229):

* * * It is admitted that the Seatrain vessels could not operate as they are intended to operate and as they are now operated without the loading devices that make possible the transfer of cars between the tracks on the vessels and the tracks of the Hoboken and of the New Orleans & Lower Coast, or without the use of railroad cars, or without the cooperation of a railroad at each of these terminals.

* * * * *

The vessel used by Seatrain is far larger and of a different type than the vessel envisaged when the word "ferry" or "car ferry" is mentioned. Its method of operation is not the method used in operating any other ferry here or elsewhere in the world. The nature of service rendered, while similar, is not the same as that rendered by ferries. * * * We assume that Congress in including and maintaining ferries in the term railroad had in mind the type of vessel then currently commonly known as a ferry, and not a vessel which, as we have seen, is of a type then unknown and which is still unique in function. * * *

* * * * *

So far as appears, none of the traffic transported by Seatrain in railroad cars can be handled without the intervention of the Hoboken or the New Orleans & Lower Coast, or except in accordance with some of the extraordinary arrangements with those companies. Except as to the transportation of a comparatively small amount

> of liquid cargo in the ships' tanks, it is impossible for Seatrain to operate as it is intended to operate and as it is operated without the special arrangements with connecting railroads for the continuous carriage of freight in railroad cars and without cooperation of such connecting railroads, * * *.

The next report in which Seatrain operations came before the Commission is *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, decided February 5, 1935. There the Commission said (p. 335):

> * * * The Seatrain method of transportation was developed for the purpose of eliminating the expenses, disadvantages, and delays incident to the transfer of lading between railroad freight cars and the holds of vessels. By means of the loading machinery described in the original report, loaded freight cars are lifted from the tracks of the connecting railroad at one port, deposited on the Seatrain vessel, which carries them to the port of destination, lifted from the vessel to the tracks of the connecting railroad, and moved to final destinations without having the contents disturbed in any way. The service performed by Seatrain is generally conceded to be superior to that afforded by steamships of the usual type.
>
> By using Seatrain service, shippers obtain what is practically equivalent to all-rail service, except for the somewhat longer

time in transit, at rates less than the all-rail rates. They are also saved packing and handling expenses necessarily incurred if the movement is over the break-bulk water routes. In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached.

On January 28, 1938, the Commission decided the case of *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7. In that report, the Commission said (p. 20):

> Defendants contend that the all-rail routes and the routes in connection with the break-bulk water lines are more than sufficient to handle all available traffic and that, accordingly, the public interest does not require the establishment of additional through routes in connection with Seatrain. Unquestionably defendants have physical facilities sufficient to handle over the all-rail routes all available traffic, but all of the traffic does not so move, primarily because in many instances the all-rail rates are too high to permit of such movement. Undoubtedly the break-bulk lines could also handle all of the traffic now moving over all of the water routes, but that is not a sufficient reason for depriving Seatrain of an opportunity to participate in

the traffic under appropriate rates or for depriving the public of the admittedly superior service afforded by Seatrain.

All of these cases were decided by the Commission before Part III, including the "grandfather" clause, was enacted. It is submitted that they constitute a true and accurate picture of Seatrain's operations, the continuance of which after the "grandfather" date, would give Seatrain that "substantial parity" which the statute affords. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; *Alton R. Co.* v. *United States*, 315 U. S. 15; *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401.

Another case was decided by the Commission after the "grandfather" date. *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 243 I. C. C. 199, decided December 23, 1940. The report in that case adds nothing of substance to what has already been quoted.

Summarized, these reports show that Seatrain's vessels can handle cargo in railroad cars only between ports at which special loading facilities have been provided, which, at that time, constituted only three ports, Hoboken, New Orleans and Havana; that Seatrain's vessels could not operate without loading devices that make possible the transfer of cars between the tracks on the vessels and the railroad tracks, or without the use of railroad cars, or without the cooperation of

the railroads at each of these terminals; that such vessels could not operate to any port not having a special type of equipment; that Seatrain's "method of operation is not the method used in operating any other ferry here or elsewhere in the world"; that none of the traffic transported by Seatrain can be handled without the intervention of the terminal switching lines; that, except for a small amount of liquid cargo, Seatrain cannot operate for the continuous carriage of freight in railroad cars without the cooperation of such connecting railroads; that Seatrain's method of transportation was developed for the purpose of eliminating the expense and delays incident to the transfer of lading between railroad freight cars and the holds of vessels; that Seatrain's service is superior to break-bulk steamer service and it can handle certain classes of freight not handled by other vessels.

This Court has noted that Seatrain's type of service "cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports." *United States* v. *Pennsylvania R. R. Co.*, 323 U. S. 612, 617.[8]

Two consequences follow from the foregoing facts:

First. When Division 4 on July 2, 1942 author-

[8] See also *Interstate Commerce Commission* v. *Hoboken Manufacturers' R. R. Co.*, 320 U. S. 368, 371–372, where Seatrain's operations are described in considerable detail.

ized Seatrain to operate "as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally", it gave Seatrain something other than what it was doing prior to the "grandfather" date, as described in great detail in the reports and decisions cited. The record before the Commission, with those reports incorporated therein, shows conclusively that Seatrain never carried commodities generally—except in freight cars, which is a very different kind of traffic. Thus Division 4 went beyond the terms of the Act, since that permitted only a "continuance" of existing operations. The 1942 certificate was, therefore, in the language of Section 17 (7), *infra*, p. 69, "unwarranted."

Second. Seatrain can do everything under the amended certificate of February 6, 1945, which it ever did in the past; that certificate authorized operation "as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars between the ports" presently in question.

The record shows that this is precisely the scope of Seatrain's past operations. To the extent that Seatrain claims a vested right in perpetuity in the erroneous certificate, it is in the position of

one who has mistakenly been given too much change by a merchant refusing to make restitution when the facts are made clear. But the authorities cited above, p. 27, show that it is the Commission's duty to see that operators are not given greater rights than they were entitled to on the "grandfather" date. Any other view would defeat the attainment of a fair and impartial regulation of the transportation system as a whole. Any other view, by allowing the original certificate to stand, by allowing "commodities generally" to include loaded freight cars and vice-versa, would not only permit Seatrain to go into the break-bulk steamship business but would also allow the break-bulk steamer lines to go into the Seatrain type of business, as appellee concedes. (R. 380.) The effect of such a course on the "fair and impartial regulation" prescribed by the Congressional declaration of a national transportation policy (Transportation Act of 1940), sec. 1, c. 722, 54 Stat. 898, 899, *infra*, p. 67), and on the command therein contained to "recognize and preserve the inherent advantages of each mode of transportation," will of course be readily apparent. If Seatrain's argument were sound, orderly regulation of commerce would come to an end.

Seatrain claims that, in addition to and apart from the goods which it handled in railroad cars, it carried "commodities generally" which moved from its own freight station without receiving a

prior or subsequent rail haul. But, in view of the fact that this traffic has to be loaded into freight cars, and shifted to or from the vessels at ports with rail facilities, it is believed that Seatrain can handle this type of traffic under the amended certificate. At any rate, it was admitted in the trial in the District Court that such traffic was not "substantial" (R. 189–190), and it is very doubtful whether, under this Court's decision in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 481, the statutory standards would be satisfied. In order for a carrier to be entitled to "commodities generally", such business must embrace "a wide variety of general commodities", or "a large group of commodities", or "a whole class or classes of property." *Id.*, at 483–484.[9]

The power of the Commission to determine whether a water carrier may transport commodities generally, or to specify what particular commodities may be transported, is not questioned, nor could it be; such a determination is to be made by the Commission upon the evidence before it.[10]

---

[9] The Commission did grant authority to transport "liquid cargoes in bulk." Crude rubber was the only other commodity referred to by counsel in the lower court (R. 172).

[10] Commodity limitations, such as those involved in *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, are similar to those considered in *Noble* v. *United States*, 319 U. S. 88. But cf. *Crescent Express Lines* v. *United States*, 320 U. S. 401. Commodity limitations are applicable in the case of

It would appear that, since past operations to support "grandfather" rights are an historical fact, Seatrain could have supplied evidence in support of its claim if such evidence had been available. Its failure to do so, its unwillingness on two distinct occasions to present evidence before the Commission in support of the original certificate, is additional proof, if indeed additional proof were needed, that that certificate granted rights greater than those which could be proved.

We submit, therefore, that Seatrain under the corrected certificate can handle traffic at its own freight stations or lighterage from New York harbor, just as it always has, but such freight and such lighterage must be delivered to it in railroad cars in the future, just as they always have in the past; it can receive freight from other water carriers, motor carriers, or by wagon, but such freight must be loaded into freight cars so that the loading and unloading devices of Seatrain can be used; obviously, since the freight is in railroad cars, it cannot be delivered to any other carrier than a railroad; and there are terminal

---

water carriers, notwithstanding the difference in wording with respect to "service" in section 208 (a) of the Act relating to motor carriers, and section 309 (d), relating to water carriers. With respect to those provisions, it would seem that a water carrier's right to "*add to*" its "service" undoubtedly does not authorize it to *change* the character of such service any more than a motor carrier's right to "add to" its "equipment and facilities" authorizes it to change the character thereof.

switching roads at Hoboken and New Orleans from which carriers it receives and delivers the freight. See p. 29, *supra*.

Finally, if in fact there can be doubt as to the scope of the corrected certificate, the proper procedure is not to set aside the entire carefully drawn report and order of the Commission, but rather to seek a clarification of its terms from the Commission. *Georgia Comm.* v. *United States*, 283 U. S. 765, 772.

(2) *The New York-Texas City Traffic*

As we have shown, the New York-Texas City service was inaugurated after the "grandfather" date between January 1, 1940, and February 1, 1941; consequently, Seatrain sought in respect thereof only a certificate authorizing continuance of this interim operation.

But, while the nature of the right was different and rested on different sections of the Act, the character of Seatrain's service was identical on both routes. The Commission originally granted only one certificate covering both operations (R. 52); Seatrain did not object then, and clearly does not object now, since it contends that its rights are governed by that certificate. Nor did Seatrain object to the amended certificate on the ground that it covered both operations. The objection went only to the Commission's power of modification.

Indeed, Seatrain could hardly contend that it should be given different operating rights over the New York-Texas City route as compared with the New York-New Orleans since it was known to the Commission, and generally, that Seatrain operated a particular type of vessel, which required a particular type of terminal facility, facilities which were available only at particular ports.

In the *Missouri Pacific* case, 245 I. C. C. 143, decided April 8, 1941, the Commission said (pp. 145, 148, 149):

> Early in the summer of 1939, Seatrain decided to inaugurate a service between Hoboken and Texas City, Tex., by adding two new vessels with one sailing each week in each direction. It also decided to establish a service between Texas City and Havana. The new service has since been established.
>
> * * * Seatrain has constructed loading and unloading facilities adjacent to the tracks of the Terminal [Texas City Terminal Ry. Co.] at Texas City, at the slip where its vessels are berthed, *similar to those at Hoboken and Belle Chasse.* The character and scope of the contractual or other arrangements between the Terminal and Seatrain are not shown of record.
>
> * * * * * * *
>
> * * * We conclude that there is no requirement that we find here that Sea-

train's service to and from Texas City is being operated in the public interest. That this service is required by the present or future public convenience and necessity must, however, be proved under section 309 of part III before Seatrain can obtain a certificate authorizing the continuance of this service.

* * * * * * * * *

The competitive situation resulting from Seatrain's operations between Texas City and Hoboken is, therefore, *substantially the same as found in the prior report to exist in connection with Seatrain's route between Belle Chasse and Hoboken.* [Italics added.]

It is clear, also, that Seatrain sought no different operating rights to Texas City than to New Orleans at the time it filed its application. The Morse affidavit of May 28, 1941, attached to the application, refers to the *Missouri Pacific Case,* quoted above, as proof of operations (R. 231).

Consequently, for the reasons stated in the discussion of the New York-New Orleans route, *supra,* pp. 27–39, when the Commission on reconsideration amended the original certificate to limit Seatrain's New York to Texas City traffic, that amendment conformed Seatrain's future authority to its earlier operations over that route.

B. THE COMMISSION HAD POWER TO MODIFY THE ORIGINAL CERTIFICATE IN VIEW OF ITS TERMS

The question presented, in view of the foregoing facts, is whether the Commission had power to correct its own mistake. We say that it had such power, particularly since the original certificate contained a reserved power in the Commission to alter its terms.

The original certificate issued to Seatrain read in part as follows (R. 52):

> *It is ordered,* That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.
>
> *It is further ordered,* That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

This is the certificate which Seatrain now contends can not be modified by subsequent orders of the Commission under the Interstate Commerce Act in order to conform the authority thereby conferred to the facts of Seatrain's past operations. As we have shown, *supra,* p. 37,

Seatrain never carried commodities generally, except in the sense that such commodities may have been loaded in freight cars. Moreover, since the Commission had held in *Foss Launch & Tug Co. Applications,* 260 I. C. C. 103, that the designation "commodities generally" did not include loaded or empty freight cars, the certificate originally granted did not permit Seatrain to carry its characteristic cargo—loaded and empty freight cars—but did permit it to transport commodities in bulk, which it had never carried in the past. The certificate was, therefore, improperly issued, and not in compliance with the requirements of the Interstate Commerce Act. When the Commission thereafter modified the certificate, it did no more than to demand that "compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder" with which the certificate itself conditioned Seatrain's exercise of the authority granted.

The inclusion in the certificate of a continuing power on the part of the Commission to limit or condition the authority granted was based on Section 309 (d) of the Act, which provides:

> Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by

such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

As the Commission said in its report on reconsideration (R. 33):

> If the Commission is without power to modify a certificate except where obtained by fraud or misrepresentation, then the proviso to the above section which prohibits the imposition, by such terms, conditions, or limitations, of restrictions upon the right of the carrier to add to its equipment, facilities, or service within the scope

> of the certificate as the development of the business and the demands of the public shall require, etc., would be meaningless.

And this Court has observed, in a related connection, that "Congress did not include authority to prescribe 'terms and conditions' merely as a preachment." *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 267.

Seatrain's attempt in the district court to minimize the effect of Section 309 (d) by restricting it to "conditions * * * as to the manner in which tariffs shall be published, as to the rendering of accounts, as to compliance with regulations for the transfer of a certificate * * *, and as to the making and filing of annual reports, contracts with other carriers, etc." is hardly convincing. The matters which appellee thus suggests as appropriate for inclusion as conditions in a certificate would be altogether out of place in a certificate specifying a carrier's operating authority. Indeed, they are specifically regulated elsewhere in separate sections of the Act. See Sections 306 (a), 306 (e), 312, 313 (a), 313 (b), 313 (c). One could as readily imagine the inclusion in a certificate of a condition relating to the rates to be charged by the carrier. While it might be beneficial to the public to authorize a water carrier to operate only upon condition that its rates be lower than rail rates by a certain amount, it seems

almost inconceivable that such a provision, or indeed any provisions relating to tariffs, accounts, reports, and the like should ever be incorporated as "conditions to a certificate" in the manner contemplated by appellee.

Obviously the statutory language regarding "terms, conditions, and limitations" is to be construed as being *in pari materia* with the other provisions of Section 309 relating to certificates, and hence as relating to the scope of operating authority granted by the Commission.

This view is supported by the construction which this Court in *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 322 U. S. 1, 4, placed on the analogous provisions in Part II of the Act; there it was held that Section 208 (a) empowered the Commission to require service to be furnished to points which the carrier did not seek authority to serve. No reason is perceived why the same language in Section 309 (d) should not be held broad enough to cover the modifications in service which the Commission ordered in this case.

The court below did not consider the foregoing case. Instead, it said that (R. 122):

> the "terms, conditions, and limitations" contemplated by Congress were of the kind that were before the Supreme Court in *Crescent Express Lines, Inc.* v. *United States,* 320 U. S. 401 and in *Noble* v. *United States,* 319 U. S. 88. The terms or conditions or limitations which may be imposed by the

> Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities generally into a car-ferry.

But the cases cited by the district court are actually authorities against Seatrain. "Terms, conditions, and limitations" have been given just precisely such a broad meaning. In *Noble* v. *United States,* 319 U. S. 88, the Court upheld the action of the Commission in imposing restrictive provisions on a permit granted a motor carrier. The applicant, who had previously operated as a contract carrier of specified commodities for a particular type of shipper, was granted only a permit authorizing the continuance of such operations, and was denied authority to operate as a contract carrier of the same commodities for all shippers. And in *Crescent Express Lines* v. *United States,* 320 U. S. 401, the Commission was similarly upheld in limiting a motor carrier, which had previously operated only seven-passenger sedans but which had sought a bus permit, to the operation of sedans. What the Commission has done here is not different in substance; it has limited Seatrain to the carriage of the same kind of freight—loaded and empty freight cars, liquid cargoes in bulk—which Seatrain carried in the past. Here, as in the two cases cited by the court below, the "terms conditions, and limitations" were such as would maintain the "substantial parity between future

operations and prior *bona fide* operations" which the Act contemplated. *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *Noble* v. *United States,* 319 U. S. 88, 92. That being so, the changes ordered by the full Commission were within the rights reserved to it in the original certificate.

What Seatrain complains of is, in necessary substance, that the Commission amended the original certificate in conformity with its plain language. But even as an original proposition, even if the certificate first issued had been unconditional and without any reserved power to alter or amend, the Commission still "can at any time recall or amend its orders, and ought to do so whenever error appears" (R. 32).

This power is based on the following provisions contained in Section 315 of the Act:

> (c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.
>
> (d) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set

aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

And, as the Commission said (R. 32):

The foregoing provisions are similar to those contained in sections 15 (2) and 16 (6) of part I. The courts have consistently treated certificates of public convenience and necessity as orders. See *State of Colorado* v. *United States*, 271 U. S. 153; *Transit Comm.* v. *United States*, 289 U. S. 121; *Moffat Tunnel League* v. *United States*, 289 U. S. 113; *Pittsburgh & W. V. Ry. Co.* v. *United States*, 281 U. S. 479; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382. The certificate and order issued is an order within the meaning of section 315. Any decision made or order entered may be reopened at any time. *Douglas & Co.* v. *Chicago, R. I. & P. Ry. Co.*, 21 I. C. C. 541; *Creomulsion Co., Inc.* v. *Southern Ry. Co.*, 185 I. C. C. 724. The Commission has complete control over its orders. It can at any time recall or amend its orders, and ought to do so whenever error appears. *Loftus* v. *Pullman Co.*, 19 I. C. C. 102. *Traugott Schmidt & Sons* v. *Michigan Central R. Co.*, 23 I. C. C. 684. This right seems also to have been recognized by the Supreme Court in *Baldwin* v. *Milling Co.*, 307 U. S. 478, although action in conformity with our order had been

taken. We had entered an order directing the payment of reparation to a shipper. One of the defendants had paid the amounts so directed. Subsequently we reopened the proceedings and found the rates previously condemned not unreasonable and set aside our findings and orders including that on which reparation had been paid. The carrier then endeavored to secure refund to it of the amounts paid. The court in sustaining our action held that the carrier could maintain a suit to recover from the shipper.

The action of the Commission here in correcting its certificate is certainly far less drastic than that sanctioned in *Baldwin* v. *Milling Co.*, 307 U. S. 478.

Additionally, the Commission's power to modify its orders flows from Section 17 (7) of the Interstate Commerce Act, 49 U. S. C. 17 (7), as follows:

> If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original de-

> termination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

In view of this provision of law, which by Section 316 (a) is made applicable to Part III of the Interstate Commerce Act, it does not seem to us necessary to consider whether the action of Division 4 in issuing the original certificate was "by inadvertence" as the Commission found (R. 39), or whether it resulted from "the considered judgment of Division 4" (R. 125), as held by the district court. We pause only long enough to remark that we perceive no grounds on which the court was free to disregard the plain finding of the Commission, particularly since that finding related to the Commission's own mental processes and was concurred in by all the members of Division 4. Cf. *Baltimore & O. R. Co.* v. *United States,* 298 U. S. 349, 359. Moreover, the word "inadvertence" is, by common usage, broad enough to cover any mistake resulting from negligence.[11]

---

[11] See the definition in Webster's New International Dictionary (2d unabridged ed. 1939):

"Inadvertence—1) The fact or action of being inadvertent [which in turn is defined as heedless, negligent, inattentive, as a negligent remark]; lack of heedfulness or attentiveness; inattention. 2) An effect of inattention; a result of carelessness; an oversight, mistake, or fault from negligence."

When Division 4 found that appellee was entitled to "a certificate authorizing continuance of the operations in which

In any event, and whatever the precise nature of the Commission's mistake, the original certificate was, by the plain language of Section 17 (7), subject to reconsideration, and, to the extent that it was thereafter found to be "unwarranted", subject to modification as well.

C. NO QUESTION OF REVOCATION IS INVOLVED

Much of the district court's opinion was taken up with demonstrating that, while the Commission had power to revoke the certificate of a motor carrier, it had no such power over the

---

it was engaged on January 1, 1940" (R. 54) and then described Seatrain's vessels in which loaded and empty freight cars were transported on rails laid on the vessel, and liquid cargo in tanks (R. 54) obviously it was an "inadvertence" on the part of the Division to grant unrestricted rights in the certificate issued on July 2, 1942. (R. 52.) Especially would this appear so when the Division's report emphasized the savings in time and expense made because transfer of lading betw n vessels and freight cars was not required. (R. 55.)

As tending to dispel the "idea of inadvertence" (R. 169) counsel for Seatrain told the district court that the 1942 certificate "was precisely in the same form as all the certificates they were granting to everybody else" (R. 169). That Seatrain was not entitled to the same certificate "precisely" given to "everybody else" is apparent from counsel's prior statement made to the district court that "there is no other carrier like Seatrain in the whole coastwise or intercoastal trade." (R. 151.) Indeed, the Commission had stated in another decision, made a part of the record here, that Seatrain's "method of operation is not the method used in operating any other ferry here or elsewhere in the world." (P. 30, *supra*.)

certificates of water carriers, and, indeed, had indicated to Congress that it did not desire such power with respect to water carriers (R. 48). But that circumstance is not relevant to the present case. No question of revocation is involved here. The Commission does not seek to terminate respondent's rights. The order under review does not bar Seatrain from the high seas or from American territorial waters. All that it involves is a modification of a certificate to make it conform to the facts of Seatrain's operations.

Of course, in one sense, every restrictive modification is a revocation *pro tanto* of a privilege previously granted. On that view the only permissible modifications would be extensions of prior grants. It is true that no one has ever suggested that the Commission lacked power to broaden its certificates, and in practice this has frequently been done. Thus, authority for water carriers to serve additional territory, denied in the original certificates, has often been granted on reconsideration. *Union Barge Line Corp. Applications,* 260 I. C. C. 563; *Terrebonne Towing Co., Inc., Applications,* 260 I. C. C. 551; *Nicholson Universal Steamship Co. Applications,* 260 I. C. C. 393; *McWilliams Blue Line, Inc., Common Carrier Application,* 260 I. C. C. 673; *Schafer Bros. S. S. Lines Application,* 250 I. C. C. 353; *Marine Transport Lines, Inc.,*

Contract Carrier Application, 260 I. C. C. 620.[12] The character of commodities which may be carried has also been enlarged. *Sudden & Christenson Common Carrier Application*, 260 I. C. C. 643.[13] Other modifications expanding the authority previously granted water carriers have been made.[14]

As we say, this power to modify certificates by way of enlargement has never been questioned, and to the extent that under the rule of the *Foss* case the original certificate did not permit Seatrain to carry freight cars, the modification made here was an extension and so is admittedly within the Commission's power. It is only insofar as

---

[12] And see, to the same effect, the following unreported decisions: W–33, *Shamrock Towing Co. Inc. Contract Carrier Application* (Aug. 25, 1945); W–306, *Calmar S. S. Corp. Common Carrier Application* (Nov. 27, 1945); W–398, *Parker Contract Carrier Application* (Apr. 1, 1944); W–496, *The Mirene Co. Applications* (Apr. 4, 1946); W–668, *Richmond Navigation Co. Common Carrier Application* (Aug. 18, 1945).

[13] To the same effect are W–420, *Knappton Towboat Co. Applications* (July 31, 1945); *Island Transportation Co. Common Carrier Application* (Nov. 29, 1945).

[14] W–498, *Hay Co. Contract Carrier Application* (May 19, 1945) (additional towage operating rights); *Baltimore Insular Line Inc. Contract Carrier Application* (Apr. 23, 1945) (restrictions on weight of commodities lifted; contract carrier certificate authorized in lieu of common carrier certificate); W–811, *Potomac River Line Common Carrier Application* (Aug. 16, 1943) (moonlight and Sunday afternoon excursions additionally authorized).

the modification made is restrictive that it is challenged—and challenged as being a revocation. Thus, on Seatrain's view, the only permissible modifications are those that have the effect of enlarging rights. It would be curious indeed if Congress intended that the Commission's power to modify should be thus artificially limited. We are convinced, for the reasons stated above, *supra*, pp. 52–54, that the power was not so limited, and certainly the Commission itself has on numerous other occasions modified prior certificates restrictively. See *Connors Marine Co., Inc., Contract Carrier Application*, 250 I. C. C. 717 (two certificates issued to separate applicants recalled and one certificate issued to both applicants to perform joint service); *Boudreaux Contract Carrier Application*, 260 I. C. C. 67 (amended certificate restricting applicant's territorial authority); W–103, *Hutton Contract Carrier Application* (Mar. 7, 1944) (restriction as to type of vessel which could be operated inserted in new certificate; old certificate recalled).

The modification involved in the instant case can in no fair sense be deemed a revocation. It does not deprive Seatrain of its right to operate; quite to the contrary, the amended certificate authorizes Seatrain to operate precisely as it has always operated in the past.

D. THE RESULT IS NOT DIFFERENT IF SEATRAIN'S RIGHTS BE DEEMED A FRANCHISE

We agree with the Court below that "Whether the certificate when issued be called a 'franchise' or not seems relatively unimportant" (R. 124), although, in view of Section 309 (e) of the Act, to the effect that "No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways", it would seem difficult to establish the proposition that a franchise had been issued. But to concede for purposes of argument that the original certificate was a franchise does not help Seatrain.

1. The original certificate was by its terms subject to future modification by the Commission. If it be deemed a franchise, then it was a variable franchise which the Commission has duly varied. To assert the contrary would seem to be equivalent to a contention that the doctrine of the *Dartmouth College* case precludes amendment of a corporate charter which was issued pursuant to a general incorporation act which included a reservation of the power to amend all charters thereafter issued.

2. We have pointed out above, *supra*, pp. 48–51, that the Commission has power under Sections 17 (7), 309(d), 315(c), and 315(d) of the Interstate Commerce Act to reconsider and modify its orders, certificates therein included. When there-

fore a certificate is issued pursuant to the Act, it would seem clear that it is subject to modification in accordance with the statutory provisions.

3. The doctrine that franchises are to be strictly construed in favor of the public right, see *Broad River Co.* v. *South Carolina*, 281 U. S. 537, 543; *Louisville Bridge Co.* v. *United States*, 242 U. S. 409, 417; *Water Co.* v. *Knoxville*, 200 U. S. 22, 33–34; *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S. 646, 664, is amply broad enough to support the Commission's power of modification, particularly in view of the reservation in the original certificate.

In view of these considerations, it seems unnecessary to pursue the "franchise" question further, or to inquire whether *Frost* v. *Corporation Commission*, 278 U. S. 515, is still law today.

II. IN ANY EVENT, IT WAS ERROR FOR THE DISTRICT COURT TO SET ASIDE THE COMMISSION'S ORDER IN RELIANCE ON EVIDENCE WHICH SEATRAIN HAD REPEATEDLY DECLINED TO PRESENT TO THE COMMISSION

On the strength of the testimony of Seatrain's president, Graham Brush, testimony admitted over appellants' objection (R. 143; see also R. 131), the district court found that "Seatrain has made substantial expenditures and commitments in reliance upon the original certificate issued by the Commission," and that "Seatrain will incur large monetary losses" if the order issuing the

amended certificate goes into effect (Fdg. 16, R. 131). This finding the court below held, "supports the conclusion that the petitioner [Seatrain] will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective" (R. 125).

The Commission found no basis in the record to support any contention with respect to commitments made on the strength of the original certificate (R. 36–37), a result which is hardly surprising in view of Seatrain's repeated refusals to present any evidence at the hearings. See pp. 9–12, *supra*. Introduction of such evidence might well have affected the result, as the Commission in its report specifically noted that its power to alter a certificate was one which would be exercised "sparingly" (R. 35), and that a certificate would not ordinarily be altered if vested rights had accrued on the strength thereof (R. 35).

The situation presented here, therefore, is as follows: Seatrain appears before the Commission denying that body's power to alter a certificate. It states, not once or casually, but advisedly on a number of occasions, that this is a pure question of law, a naked matter of power, and that therefore it will not introduce evidence. Defeated on the question of power before the Commission, Seatrain applies to the district court,

again alleging the Commission's lack of power to alter a certificate once issued. This time, however, Seatrain mends its hold: it alleges that the alteration of the certificate after expenditures had been made in reliance on its terms amounts to confiscation, and "would, if permitted to become effective and enforced, deprive plaintiff of property and take its property for public use without just compensation and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States." (Petition, par. 50, R. 21.) On the strength of that generalized allegation,[18] Seatrain then offers the very evidence which it refused to present to the Commission; and the court receives the evidence and relies on it to set aside the Commission's order. In other words, on the precise issue of the Commission's power *vel non* to modify the original certificate, the court on one record decides that the Commission erred in the result which it reached on another record.

This was plain error. A long line of cases holds that, when administrative orders are sought to be set aside in the courts, evidence which was not before the administrative agency may not be

---

[18] It may well be doubted whether the general allegations of confiscation contained in the petition were sufficient even to raise the issue. See *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 315; *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86–89.

received. *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177; *Acker* v. *United States,* 298 U. S. 426; *Tagg Bros.* v. *United States,* 280 U. S. 420; *United States* v. *Louisville & N. R. R. Co.,* 235 U. S. 314. Extracts from the opinions in these cases show the broad scope of the rule.

In *National Broadcasting Co.* v. *United States,* 319 U. S. 190, also brought under the Urgent Deficiencies Act, the Court said (319 U. S. at 227):

> A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros.* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426.

In *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177, the Court said (305 U. S. at 185):

> The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question

must be determined upon the evidence produced before the Commission.

And in *Tagg Bros.* v. *United States,* 280 U. S. 420, the Court, speaking through Mr. Justice Brandeis, stated the rule in the following terms (280 U. S. at 443–444):

> A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him,—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. *Louisville & Nashville R. R. Co.* v. *United States,* 245 U. S. 463, 466; compare *Liscio* v. *Campbell,* 34 F. (2d) 646, 647; and see *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50 and *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate making body. Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention,

> the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. Compare *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 550. A rate order is not *res judicata*. Every rate order made may be superseded by another.

Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349, and *United States* v. *Idaho*, 298 U. S. 105, cited and relied upon by the district court, are not to the contrary.

In the *Idaho* case, the question turned on the authority of the Commission to order abandonment of a spur track wholly within the State of Idaho. This Court noted that "This suit is not one brought to set aside for error or irregularity an order of the Commission on a matter within its jurisdiction. * * * Here, the jurisdiction of that Commission was challenged." Pp. 109, 110. Consequently, since the question was one for judicial rather than administrative determination, see *Yonkers* v. *United States*, 320 U. S. 685, 689, new evidence was properly received. But here, in the *Seatrain* case, there is no question of the Commission's jurisdiction in the premises; the only question is whether, in view of the terms of the certificate and of the Act, the Commission could modify the authority originally granted.

Nor is the *Baltimore & Ohio* case, when properly analyzed, any more helpful to Seatrain, for while there the Court approved the action of the district court in receiving new evidence on the issue of confiscation, that approval was expressly predicated upon the Commission's refusal to receive that evidence. The Court noted that (298 U. S. at 363):

> Prior to the taking effect of the order, appellants filed a petition for rehearing in which they claimed that its enforcement would confiscate their property; they then make substantially the same contentions as they make in this suit and sought opportunity to support them by evidence in order to obtain the commission's findings of fact and decision upon the question of confiscation. But the commission denied their application.

Where, as here, an order of the Commission is attacked as being confiscatory in the constitutional sense, the contention can not first be advanced in the district court and there determined on the strength of evidence which was deliberately withheld from the Commission. The applicable rule is that laid down by this Court in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 489, 490:

> * * * correct practice requires that, in ordinary cases, and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Com-

> mission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties. * * * Hence, we cannot approve of the course that was pursued in this case, of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory.

Moreover, we believe that the doctrine that administrative remedies must first be exhausted before the courts are appealed to for relief, even when the issue is a constitutional one, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, disposes of the last vestiges of the notion that there can always be a trial *de novo* on constitutional issues. We read the *Myers* case as meaning that Seatrain here had no standing to raise the issue of confiscation in the district court since it did not raise that issue before the Commission, that in order to obtain review on the ground of confiscation it must first have argued to the Commission that the proposed modification of the certificate would have had that effect. But Seatrain neither argued confiscation to the Commission nor presented evidence. Consequently it did not exhaust its administrative remedies, so that the district court lacked jurisdiction to set aside the Commission's order on that ground.

We believe, also, that Seatrain's failure to produce evidence to the Commission amounts in

substance to an acquiescence on the facts, so as to bring this case within the scope of *United States* v. *Hancock Truck Lines*, 324 U. S. 774; there the Court held that it was improper for a district court to reverse an order of the Interstate Commerce Commission in respect of a provision therein as to which the suitor had advised the Commission that it no longer objected but acquiesced.

In any event, and whatever the scope of the *Myers* and *Hancock* doctrines here, Seatrain cannot, by recasting its assertion of the Commission's lack of power to modify a certificate in terms of unconstitutional confiscation, go on to support that assertion in the courts with testimony which it refused to present to the Commission. To permit it to do just this, as the district court did, would be to turn judicial review into a contest, into a species of shell game, an absorbing kind of legal legerdemain where the same question receives different answers before different tribunals as testimony which is withheld at one juncture is suddenly produced at another. Such a practice, sanctioned here by the district court, goes a long way towards unsettling the integrity of the administrative process. Cf. *United States* v. *Morgan*, 307 U. S. 183.

CONCLUSION

The judgment of the district court should be reversed, with directions to dismiss the petition.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
EDWARD DUMBAULD,
Special Assistants to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,

EDWARD M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

OCTOBER 1946.

APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

[APPLICABLE TO ALL PARTS]

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Sec. 1, Act of Sept. 18, 1940,

c. 722, 54 Stat. 898, 899; 49 U. S. C., notes preceding §§ 1, 301 and 901.

* * * * *

PART I

* * * * *

SEC. 17 (3). The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission, the Secretary of the Commission, or any member of a board may administer oaths and affirmations and any member of the Commission or the Secretary of the Commission (or any member of a board in connection with the performance of any work, business, or functions referred under this section to a board upon which he serves) may sign subpenas. A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual Commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division, individual Commissioner, or board and be heard in person or by attorney. Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon

the request of any party interested. All hearings before the Commission, a division, individual Commissioner, or board shall be public upon the request of any party interested. No Commissioner or employee shall participate in any hearing or proceeding in which he shall have any pecuniary interest. (49 U. S. C. 17 (3).)

SEC. 17 (7). If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order. (49 U. S. C. 17 (7).)

SEC. 17 (9). When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the

Commission, but not otherwise. (49 U. S. C. 17 (9).)

* * * * *

PART II

* * * * *

SEC. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of

any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

(b) Except as provided in section 5, any certificate or permit may be transferred, pursuant to such rules and regulations as the Commission may prescribe. (49 U. S. C. 312.)

* * * * *

PART III

* * * * *

SEC. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for opera-

tions of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

* * * * *

(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commis-

sion finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied.

(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

(e) No certificate issued under this part shall confer any proprietary or exclusive right or rights in the use of public waterways. (49 U. S. C. 909.)

* * * * *

SEC. 315. (c) The Commission may suspend, modify, or set aside its orders under this part upon such notice and in such manner as it shall deem proper.

(d) Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, as the Commission may prescribe and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended, modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

(e) It shall be the duty of every water carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect. (49 U. S. C. 915.)

SEC. 316. (a) The provisions of section 12 and section 17 of part I, and the Compulsory Testimony Act (27 Stat. 443), and the Immunity of Witnesses Act (34 Stat. 798; 32 Stat. 904, ch. 755, sec. 1), shall apply with full force and effect in the administration and enforcement of this part. (49 U. S. C. 916.)

U. S. GOVERNMENT PRINTING OFFICE: 1940